STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2003
v	No. 239340 Wayne Circuit Court
DWAYNE E. SHIPP, Defendant-Appellant.	LC No. 01-003956

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under thirteen years of age). Defendant was sentenced to fifty-seven months' to fifteen years' imprisonment. We affirm defendant's conviction, but remand for resentencing.

Defendant contends that the trial court erred in allowing the prosecutor to "essentially amend the information" by allowing the minor victim to testify about an act that allegedly occurred on a date outside the range of dates stated in the information. Because the trial court did not actually amend the information, this contention of error is subsumed by defendant's challenge to the admissibility of the minor victim's testimony about that act.[1]

Generally, a trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999). An abuse of discretion will be found only where "an unprejudiced person, considering the facts on which the trial court

[1] We note that MCR 6.112(H) allows the trial court to grant a prosecution motion to amend the information "before, during, or after trial," so long as the proposed amendment would not unfairly surprise or prejudice the defendant. See also MCL 767.76. Here, defendant testified that he did not ever improperly touch the minor victim. Moreover, defendant's testimony provided an explanation for the two allegations of improper conduct. Thus, even if the trial court had amended the information to expand the dates to include both allegations of improper conduct, we do not believe that defendant would have been unfairly surprised or prejudiced. Therefore, unless the minor victim's testimony was inadmissible, the trial court would not have erred in amending the information so that it would correspond with her testimony.

acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Defendant specifically contends that the evidence was inadmissible pursuant to MRE 404(b). MRE 404(b)(1) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Here, we agree with defendant's assertion that identity, plan, scheme, and design were not at issue. However, defendant testified that he may have inadvertently touched the victim in improper places while disciplining her and that the contact, if any, was not for a sexual purpose. Thus, defendant proposed a theory that the allegation involved either a "mistake or accident." Therefore, evidence of the later act was admissible for the proper purpose of establishing the "absence of mistake or accident," MRE 404(b)(1).

Defendant also summarily contends that the evidence was inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice, MRE 403. See also *People v Werner*, 254 Mich App 528, 539-540; 659 NW2d 688 (2002). However, given that the evidence was admitted for a proper purpose, we are not persuaded that defendant was *unfairly* prejudiced by the evidence. Consequently, the trial court did not abuse its discretion in concluding that the evidence was admissible.[2] *Cain, supra* at 122.

Next, defendant contends that the trial court erred in denying his motion to dismiss the case based on the prosecutor's failure to provide a police officer's written report about defendant's handwritten statement until the morning of the trial. Defendant also challenges the trial court's denial of his request to, in the alternative, exclude the police officer's testimony.

MCR 6.201(A)(2) states that a party in a criminal action must, upon request, disclose any written statement by a lay witness whom the party intends to call at trial. In addition, MCR 6.201(B) states as follows:

> Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:
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> * * *

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[2] Defendant's brief also contends, without explanation, that the same evidence was also inadmissible pursuant to MRE 404(a). However, MRE 404(a) covers evidence relating to a person's character traits. Here, the admissibility of the evidence in question was controlled by MRE 404(b). Therefore, defendant's contention of error is without merit.

> (2) any police report concerning the case, except so much of a report as concerns a continuing investigation;
>
> (3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective witness at trial . . . .

If MCR 6.201(A) or (B) is violated, MCR 6.201(J) states that a trial court may "order that testimony or evidence be excluded, or may order another remedy." We review a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

Here, the prosecutor explained that she was not aware that the police officer took a statement from defendant until the Monday before the trial, after meeting with the minor victim's mother and speaking with defense counsel. The prosecutor further noted that she even asked defense counsel for a copy of that report. Ultimately, the prosecutor stated that she did not receive a copy of the written report until the morning of the trial, and that she promptly provided defense counsel a copy. The prosecutor noted that defense counsel was aware of the report, preventing any concern that defendant had been prejudiced. Defense counsel countered by stating that he was only aware of a three-sentence summary of the report, and had not seen the police officer's two-page report.

The trial court ruled that defendant was only minimally prejudiced by not having the full report until the morning of the trial. Moreover, the trial court noted that defendant must have been aware that he prepared a handwritten statement that formed the basis of the police officer's report. Accordingly, the trial court declined to grant a mistrial or exclude the testimony.

Indeed, the trial court correctly noted that the police report in question concerned defendant's handwritten statement. Defendant was obviously aware that the statement had been made. In other words, the instant matter is distinguishable from a situation where the prosecution fails to disclose information that a defendant could not have known existed until the prosecution attempted to introduce it at trial. Thus, under the circumstances, we are not persuaded that the trial court abused its discretion in not imposing the harsh remedies requested by defendant. *Davie, supra* at 597-598.

Finally, defendant challenges the constitutionality of MCL 769.34(10). However, we note that the instant offense took place before January 1, 1999. Accordingly, defendant should not have been sentenced under the legislative sentencing guidelines, MCL 777.1 *et seq*., and he should have instead been sentenced under the judicial sentencing guidelines. See *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000). Consequently, we vacate defendant's sentence and remand the matter for resentencing under the judicial guidelines.[3]

[3] Therefore, defendant's challenge to MCL 769.34(10) is moot.

Defendant's conviction is affirmed. His sentence is vacated and the case is remanded for resentencing under the judicial guidelines. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Christopher M. Murray